



THE PREROGATIVE RIGHT OF REVOKING TREATY PRIVILEGES TO ALIEN-SUBJECTS

BY

THOMAS HODGINS, LL.D.

*Judge of the Echequer Court in Admiralty, Canada; and Member of the
International Law Association, London.*

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International Treaties, or Conventions, may be divided into two classes. One class may prescribe and define the sovereign international relations, rights, duties, privileges, and obligations of the respective Treaty-contracting nations, such as relate to peace and war, contraband of war, neutrality, alliances, guarantees, or to the territorial possessions, or boundaries of their respective nations; or such other questions of *la haute politique extérieure*, as may affect their sovereign relations, *inter se*, as members of the Society of Nations.

Another class of Treaties may concede the allowance, and prescribe the conditions, of subordinate, or "alien-subject," privileges or commercial concessions, under which the alien-subjects of another nation may be privileged to share with the home-subjects of the conceding nation, in certain of their natural rights in the public property, trade and commerce, or may be allowed territorial admission and residence, transit of persons or goods, privilege of coast-fisheries, or user of territorial easements, to all, or to designated, classes of the alien-subjects or citizens, of another nation. This secondary political class of "alien-subject," or commercial, or municipal Treaty concessions, comes within the doctrine of International Law that: "A State may *voluntarily* subject itself to obligations of another State, both with respect to persons and things, which would *not naturally* be binding upon her. These are *servitutes juris gentium voluntariae*."¹ Other classifications of Treaties have been made by various authorities on International Law, which divide them into more classes than those suggested above.²

¹ Phillimore's International Law, (3rd ed.), vol. 1, p. 391.

² Hall's International Law, (5th ed.), p. 360.

The generally assumed doctrine of International Law on the prerogative power of a sovereign nation to vary, or abrogate, Treaties has been broadly stated thus: "Private contracts may be set aside on the ground of what is technically called in English law the want of consideration, and the inference arising from manifest injustice, and want of mutual advantage. But no inequality of advantage, no *lésion*, can invalidate a Treaty."³ Further, as Vattel says: "An injury cannot render a Treaty invalid. If we might recede from a Treaty because we found ourselves injured, there would be no stability in the contracts of nations."⁴ But without impeaching this assumed doctrine as applicable to Treaties which deal with the higher international rights and responsibilities of nations, as sovereignties, it will be found that it has not been universally accepted by other recognized authorities on International Law as applicable to gratuitous, or reciprocal, commercial or residential privileges, or territorial easements, conceded to the subjects or citizens of foreign nations; nor by some nations in the higher relations of sovereignties *inter se*; as when Russia in 1871 sought to revoke the provision in the Berlin Treaty of 1856, which "in perpetuity interdicted to the flag of war" the Black Sea and its coasts. The protocol of the signatory Powers to the original Treaty declared that "it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement."⁵ To apply such an absolute doctrine to Treaty concessions respecting trade and commerce, coast fisheries, transit of persons or goods, admission and residence, or privileges in certain natural rights in the public property or municipal privileges of the home-subjects of a conceding nation, to the alien-subjects or citizens of another nation, would involve the unconditional surrender of an inherent and inalienable prerogative of territorial sovereignty; in other words a perpetual national servitude of the conceding nation to the alien-subjects of another nation, which would be an international degradation of its inherent political supremacy as a nation—not sovereign independence and international equality.

³ Phillimore's International Law, (3rd ed.), vol. 2, p. 76.

⁴ Vattel's Law of Nations, p. 194.

⁵ Wheaton's International Law, (1878), p. 712.

Of the nations which have not accepted the above assumed doctrine in its entirety as a recognized doctrine of International Law, the United States has been the most pronounced; for it has furnished the largest number of modern instances of the exercise of legislative and prerogative powers of variation, or abrogation, of Treaties entered into by it with foreign nations. And respecting the second, or "alien-subject," or commercial, class of Treaties, its Supreme Court has said: "A Treaty may also contain provisions which confer certain rights upon the citizens, or subjects of one of the nations within the territorial limits of the other, which partake of the nature of local municipal law, and which are capable of enforcement as between private parties in the courts of the country." "The Constitution of the United States makes the Treaty while in force a part of the supreme law of the land, and in this respect, as far as the provisions of a Treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such Acts as Congress may pass for their enforcement, modification, or repeal,"* without the assent of the foreign nation with which the Treaty had been made.

By the Constitution of the United States, its legislative powers are vested in two departments of the Supreme Government: (a) by Article I., which provides that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and (b) by Article II., which provides that "the President shall have power, by and with the consent of the Senate, to make Treaties, provided that two-thirds of the Senators present concur."

Then Article VI. declares that three instruments, viz.:—

"(a) This Constitution, and (b) the laws of the United States which shall be made in pursuance thereof, and (c) all Treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

These articles of the Constitution received an early interpretation by Chief Justice Marshall in their Supreme Court: "Where a Treaty is the law of the land, and as

* *Head Money Cases*, (1884), 112 U.S. 580; *Moore's Digest of International Law*, v. 5, p. 366.

such affects the rights of the parties litigating in Court, that Treaty as much binds those rights, and is as much to be regarded by the Court, as an Act of Congress."⁷ And as to the repealing effect of a Treaty over the previous legislative Acts of State Legislatures it had been earlier declared by the same Supreme Court, that "a Treaty, as the supreme law, overrules all State laws on the same subject, to all intents and purposes."⁸

It may be conceded generally that whenever, under a constitutional government, a Treaty becomes operative by itself, its confirmation by a legislative act is not necessary. But where it imports a contract, or where money is required to be appropriated, or fiscal revenue affected, or territory to be ceded, in each of such cases a Legislative Act becomes necessary before the Treaty can be given the force of law; for the public money cannot be appropriated, nor fiscal charges be varied, nor national territory ceded (except as a result of war), by the Treaty-making power of a Government. As said by Chief Justice Marshall, where the language of a Treaty is that of a contract, what is promised must be the Act of the Legislature. "Until such Act shall be passed, the Court is not at liberty to disregard the existing laws on the subject."⁹

By the exercise of the legislative and judicial process of constitution-making assumed by the Congress and Courts of the United States, it has been legislatively and judicially determined that Treaties made by the United States with foreign nations, are subject to the same Congressional power of variation, or abrogation, as are the ordinary legislative Acts of Congress.

This Congressional power of abrogation was first exercised by the United States in 1798, by "An Act to declare the Treaties heretofore concluded with France no longer obligatory on the United States." After a preamble reciting, among other grounds, that the Treaties with France had been "repeatedly violated on behalf of the French Government," it enacted "that the same shall not hence-

⁷ *United States v. Schooner Peggy*, (1801), 1 Cranch (U.S.), 103.

⁸ *Ware v. Hylton*, (1796), 3 Dallas (U.S.), 199; *Passenger Tax Cases*, (1849), 7 Howard, 283; Moore's Digest of International Law, vol. 5, ss. 777 and 778.

⁹ *Foster v. Neilson*, (1829), 2 Peters (U.S.), 314; American and English Encyclopædia of Law, (2nd ed.), vol. 28, p. 480; *Damodhar Gordham v. Deoram Kanji*, (1876), 1 Appeal Cases, 332.

forth be regarded as legally obligatory on the Government or citizens of the United States."¹⁰

The alleged cause was a decree, or legislative act, of the French Directory of 1796 which declared that "every vessel found at sea, loaded in whole or in part with merchandise the production of England, or of her dependencies, shall be declared good prize, whoever the owner of the goods or merchandise may be," thereby abrogating the Treaty of 1778, which provided that "free ships shall give freedom to goods on board of the ships of the subjects of either nation, contraband goods excepted."¹¹

A case with Russia affecting this subordinate class of trade and commerce, under a Treaty of 1832, under which it was claimed that no higher duty than 25 dollars per ton should be chargeable on Russian hemp, raised a similar question. By a subsequent Act of Congress the duty was raised to 40 dollars per ton. An action was brought in a United States Court for a refund of the extra duty; but the Court held that such a Treaty belonged to diplomacy and legislation; and that Congress might repeal it so far as it was municipal law, adding: "To refuse to execute a Treaty for reasons which approve themselves to the conscientious judgment of a nation is a matter of the utmost gravity and delicacy, but the power to do so is prerogative, of which no nation can be deprived without deeply affecting its independence."¹² In a later case, involving a similar question, the Court said: "Congress may render a Treaty inoperative by legislation in contradiction of its terms, without formal allusion at all to the Treaty; thus modifying the law of the land without denying the existence of the Treaty or the obligations thereof between the two Governments as a contract."¹³

This latter policy has been applied to Canada on more than one occasion by the United States. Shortly after Jay's Treaty of 1794, the Executive of the United States nullified the 3rd article of that Treaty, which provided that "it shall at all times be free to the subjects and citizens of both nations freely to pass and repass, by land or internal navigation, into the respective territories of the two nations, and freely to carry on trade with each other." It further pro-

¹⁰ Statutes at Large, (U.S.), vol. 1., p. 578, c. 67.

¹¹ American State Papers, Foreign Relations, vol. 2, pp. 169-182.

¹² *Taylor v. Morton*, (1855), 2 Curtis, (U.S.), 454.

¹³ *Ropes v. Clinch*, (1871), 8 Blachford, (U.S.), 304.

vided that all goods and merchandise (not prohibited by law) should "freely, for the purposes of commerce, be carried into the United States by His Majesty's subjects; and such goods or merchandise shall be subject to no higher duties than those payable by the citizens of the United States on importations of the same on American vessels into the Atlantic ports of the said States." The duty payable on such importations at the Atlantic ports was 16½ per cent., but the United States enforced the payment by Canadians of a duty of 22 per cent. at the inland ports along the Canadian boundary line; and also a fee of 6 dollars for a license to trade with the Indians, not chargeable against American traders. And on the acquisition of Louisiana in 1803, trade from Canada west of the Mississippi, was prohibited to all persons who would not abjure their allegiance to His Majesty and become citizens of the United States.¹⁴ Thus was turned into diplomatic irony the closing words of the Article:—

"As this Article is intended to render in a great degree the local advantage of each party common to both, and thereby to promote a disposition favourable to friendship, and good neighbourhood, it is agreed that the respective Governments will mutually promote this amicable intercourse, by causing speedy and impartial justice to be done, and necessary protection to be extended to all concerned therein."¹⁵

A similar policy was adopted in 1875 by Congress imposing a customs duty on the tin cans in which Canadian fish and fish oil were entitled by Article 21 of the Treaty of Washington of 1871 to be imported into the United States "free of duty." The Act of Congress enacted: "That cans or packages made of tin or other material, containing fish of any kind admitted free of duty under any law or Treaty,"¹⁶ should be subject to a specific duty. The effect of this legislation was reported by the British Minister to the Imperial Foreign Office, as an attempt to levy a duty upon Canadian fish; and was an infraction of the 21st Article of the Treaty of 1871, and entirely opposed to the spirit of that Treaty; "for it is, of course, impossible to import fish of that sort without the protection of these tin

¹⁴ American State Papers, Foreign Relations, vol. 3, p. 152.

¹⁵ Treaties and Conventions between the United States and Other Powers, p. 319.

¹⁶ Statutes at Large, (U.S.), vol. 18, p. 308, c. 36.

cans, which are themselves, when once broken open, of no use or value whatever;" adding that the duty "would prohibit entirely the importation of fish from Canada into the United States, and render the stipulation of the Treaty illusory."¹⁷ Canada imposed no retaliatory duty on American tin cans containing fish or fish oil imported into Canada under the same Article.

The diplomatic relations between the United States and China furnish several illustrations of the Congressional revocation of Treaties conceding municipal and reciprocal international privileges, or concessions, to the subjects of that Empire.

By what is known as the Burlinghame Treaty with China of 1868, it was provided that citizens of the United States visiting, or residing, in China, and Chinese subjects visiting, or residing, in the United States, should reciprocally enjoy the same privileges, immunities and exemptions in respect to travel or residence as may then be enjoyed "by the citizens or subjects of the most favoured nation;" and that they should also reciprocally enjoy all the privileges and immunities of the public educational institutions under the control of either nation "as are enjoyed in the respective countries by the citizens or subjects of the most favoured nation."

The first Congressional variation of the provisions of this Treaty was made in 1875, by which contracts of service with Chinese subjects were declared void within the United States.¹⁸

In 1880, another Treaty with China provided that the Government of the United States might regulate, limit, or suspend the coming or residence, of Chinese labourers in the United States, "but may not absolutely prohibit it."¹⁹

Notwithstanding the Treaty concession to Chinese subjects of such reciprocal privileges as were enjoyed in the United States "by the citizens, or subjects, of the most favoured nation," Congress passed an Exclusion Act in 1888,

¹⁷Canada Sessional Papers, (1877), vol. 10, No. 14, p. 5-6.

¹⁸Statutes at Large, (U.S.), vol. 18, p. 477, c. 141. In a despatch to the United States Minister, 1869, on the policy to be pursued toward China, Mr. Secretary Fish said: "You will make clear to the Government to which you are accredited the settled purpose of the President to observe with fidelity all the treaty obligations of the United States;" Foreign Relations, (U.S.), 1870, p. 303.

¹⁹Compilation of Treaties in Force, (U.S.), 1890, p. 118.

depriving Chinese subjects of certain Treaty privileges.²⁰ On appeal the Supreme Court held that "the Exclusion Act of 1888 was in contravention of the express stipulations of the Treaty of 1868, and of the Supplementary Treaty of 1880;" and that it was "a constitutional abrogation of the existing Treaties with China;" adding:—

"The power of the exclusion of foreigners, being an incident of sovereignty belonging to the Government as part of the sovereign powers delegated by the Constitution, the right to its exercise at any time, when, in the judgment of the Government, the interests of the country require it, cannot be granted away, or restrained, on behalf of anyone. The powers of Government are delegated in trust and are incapable of transfer to other parties. Nor can their exercise be hampered when needed for the public good. The exercise of these public trusts is not the subject of barter or contract. Whatever license Chinese labourers may have obtained is held at the will of the Government, revocable at any time at its pleasure. Unexpected events may call for a change in the policy of the country; so violations on the part of the other contracting party may require corresponding action on our part. When a reciprocal engagement is not carried out by one of the contracting parties, the other may decline to keep the corresponding engagement. . . . But far different is the case where a continued suspension of the exercise of a prerogative power of abrogation is insisted upon as a right, because by the favour and consent of the Government of the nation it has not heretofore been exercised. To preserve its independence, and to give security against foreign aggression and encroachments, is the highest duty of every nation; and to attain these ends nearly all other considerations are subordinated. The rights and interests created by a Treaty which have become so vested that its expiration, or abrogation, will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer, or other disposition; not such as are personal and intransmissible in their character. . . . Between property rights not affected by the termination, or abrogation, of a Treaty, and expectations of personal benefits from the continuance of existing Treaty legislation, there is as wide a difference as between realization and hopes."

²⁰Statutes at Large, (U.S.), vol. 25, pp. 476 and 504, cc. 1015 and 1064; *Fong Yue Ting*, (1892), 149 U. S. 711.

And the President, in his Message to Congress approving of the Chinese Exclusion Act of 1888, intimated that an emergency had arisen for the exercise of the legislative power of the United States; and that the facts and circumstances which he had narrated led him "to join with Congress in dealing legislatively with the exclusion of Chinese labourers, in lieu of further attempts to adjust it by International agreements."²¹

The Supreme Court also held that the sovereign and legislative power of the Government to exclude aliens from the territory of the United States, who claimed the Treaty privilege of entering its territory, was incident to the inherent and inalienable prerogatives and sovereignty of the nation, which could not be surrendered in perpetuity to the subjects of foreign nations by the Treaty-making power of that Government; and that such Treaty privilege of entering the territory of the United States was practically "during pleasure," and was revocable at any time whenever the sovereign interests of the Government demanded it, or whenever the natural rights of its citizens were injuriously affected. This inherent prerogative of sovereignty to exclude aliens from British territory, and to prescribe what conditions it pleases to the permission to enter and reside in it, has been approved by the Judicial Committee of the Privy Council, and is therefore equally the law of the British Empire.²² And the doctrine of International Law concurs that: "No stranger is entitled to enter the boundaries of a State without its permission, much less to interfere with its full exercise of supreme dominion."²³

"The right of a State to expel foreigners from her territories is sometimes called the *Droit de Renvoi*. . . . Concomitant with this *Droit de Renvoi* is that of the taxation of aliens by the State in which they are commorant. This right is a powerful incident to sovereignty, the exercise of which, unless abused, cannot, in general, be made the subject of diplomatic remonstrance."²⁴

²¹ Chinese Exclusion Cases, (1880), 130 U. S. 581; See further Moore's Digest of International Law, v. 4, pp. 187-238; v. 5, p. 367; Senate Ex. Doc. No. 273, 1887-8, pp. 4-5.

²² *In re Adam* (1837), 1 Moore, P.C. 400; *Attorney-General of Canada v. Cain*, (1906), Appeal Cases 542.

²³ Phillimore's International Law, (3rd ed.), vol. 1, p. 221.

²⁴ Halleck's International Law, v. 1, p. 486. Bluntschli's *Droit International Codifié*, v. 1, p. 228.

The Supreme Court's decision as to "intransferable privileges" harmonizes with the Roman Law which declares: "*Servitutes personales* include *usufructus*, and are enjoyable by sufferance, or forbearance, and so are subject to the *jure dominii*. The *usufructuarius* cannot alter the form of the grant of the thing which the *dominus utilis* can. The first cannot grant away his right, the latter can. Such rights as these are for mutual accommodation, and are consequently of a private nature; but they will not be valid where they perniciously affect the public good."²²

The fishery privileges conceded to the "inhabitants of the United States" of the trade-class of "American fishermen" by the Treaty of 1818, are within this rule as being privileges intransferable to other trade classes in the United States.

These decisions have now become incorporated into the International Law of the United States; and have attained the authority of precedents controlling the Treaty-making powers of that Government respecting the secondary class of Treaties conceding "alien-subject," or commercial, or municipal, privileges in what may be defined as "the natural rights of home-subjects;" and must therefore be accepted as exceptions to the generally assumed doctrine of International Law, quoted in the beginning of this article; and as establishing a distinction in the applicability of that doctrine to Treaties respecting the higher international rights and relations which affect nations as sovereignties *inter se*, and Treaties which concede alien-subject, or commercial, or municipal, privileges in the natural rights of the home-subjects, or citizens, of the conceding nation. For a consistent succession of precedents have an authentic force in International Law, and are also invaluable in diplomacy. And if accepted as authoritative precedents by other nations, governing their Treaty-making powers with the United States, their international force cannot fairly be repudiated by its Government, as not being equally within the inherent prerogative powers of such other nations; nor questioned on the ground that such nations are not entitled to recognize and apply them as reciprocal and authoritative precedents in their international and Treaty-making relations with the United States.

²²Coquihoun's Roman Civil Law, vol. 2, pp. 17 and 93.

The *ratio suaviorum* of these precedents seems to lead to this conclusion: The prerogatives of sovereignty are regal trusts vested in the Sovereign, as the executive authority of the nation, for the protection of the natural rights and property of his subjects, and for the promotion of their welfare and good government; and that in the execution of the regal trust of the maintenance of the territorial inviolability and sovereignty of the nation, it is not unlimitedly within the treaty-making power of such executive authority, as the temporary trustee of the national sovereignty, to concede to a foreign nation for the benefit of the commerce, or municipal privileges, of its subjects, within the territory of the conceding nation, either for a limited time, or in perpetuity, or "in common with the home-subjects," any interest, easement, or privilege, in the natural, or public property, rights to which the home-subjects are entitled. Nor is there any natural right of the subjects or citizens of a foreign nation to enter, or reside, within the territory of another independent nation without the consent of its executive authority. But whenever the executive authority of such nation concedes, either tacitly as a matter of comity,²⁸ or by a written permission in the nature of a treaty, any such reciprocal or gratuitous permission to the alien-subjects or citizens of another nation to enter or reside, or trade in its territory, or certain privileges in the natural rights, or in the public property, of the home-subjects, such concessions are to be considered as "during pleasure;" and subject to the inherent prerogative right of revocation at any time, whenever the natural rights in the public property, or the national welfare, of the home-subjects, or the interests of state policy, or the maintenance of the territorial inviolability and sovereignty of the conceding nation, require such revocation.

And, sustaining this reasoning, and also the claim of the natural rights of the home-subjects in the public property of their nation, of which the coast fisheries form a part, Vattel is equally explicit:

"It is very just to say that the nation ought carefully to preserve her public property and not to dispose of it without

²⁸ "Comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of a nation by which it is offered; and it is inadmissible when contrary to its policy, or prejudicial to its interests." *Bank of Augusta v. Earle* (1839), 13 Peters. (U.S.), p. 589.

good reason, nor to alienate, or charge it, but only for a manifest public advantage, or in case of a pressing necessity. The public property is extremely useful, and even necessary to the nation; and she cannot squander it improperly without injuring herself, and shamefully neglecting the duty of self-preservation. As to the property common to all the citizens, the nation does an injury to those who derive advantage from it, if she alienates it without necessity, or without cogent reasons. . . . The prince, or the superior of the society, being naturally no more than the administrator, and not the proprietor, of the State, his authority as sovereign, or head of the nation, does not of itself give him a right to alienate, or charge, the public property. The right to do this is reserved to the proprietor alone, since proprietorship is defined to be the right to dispose of a thing substantially. If he exceeds his powers with respect to this property, the alienation he makes of it will be invalid; and may at any time be revoked by his successor, or by the nation." . . . "The rules we have just established relate to alienations of public property in favour of [alien] individuals." 27

Respecting Treaties which concede voluntary, or unequal, servitudes to alien-subjects, without any corresponding, or reciprocal, privileges, or concessions, Hautefeuille sustains the exception to the generally assumed doctrine of International Law, quoted above, and says:—

"Treaties are in general obligatory on the nations which have consented to them; however they have not this quality in an absolute manner (*cependant ils n'ont pas cette qualité d'une manière absolue*). The unequal Treaty, or even the equal, conceding the gratuitous, or free, cession, or surrender, of an essential natural right—that is to say, without that which a nation cannot be considered as existing still as a nation, such for example with even partial independence, [these Treaties] are not binding, (*ne sont pas obligatoires*). They exist as long as the two nations persist in desiring their existence. But each of the two nations has always the right to discontinue (*le droit de les rompre*), that which affects the surrender, or concession, of an essential natural right, by anticipating the other party in denouncing the Treaty. The reason of the invalidity of transactions of this nature is that these natural rights of this quality are inalienable; and

to make use of an expression of the civil law, they are 'out of commerce' ('*hors le commerce*'). It is so of Conventions alike equal in which essential natural rights are affected, which operate only on the private, and secondary, interests of the people; these are always obligatory during the time fixed for their duration. But if there is no time fixed, then even if they have been declared perpetual, they have no existence but by the continuation of the two wills that have created them, (*elles n'ont d'existence que par la continuation des deux volontés qui les ont créées*). The stipulation of perpetuity has no other effect than to avoid the necessity of renewing (*d'éviter la nécessité de renouveler*) the Convention."²⁰

Other authorities express similar views. Heffter says that a State may repudiate a Treaty when it conflicts with "the rights and welfare of its people." Bluntschli says that while a State may be required to perform the onerous engagements it has contracted which are degrading to its *amour propre*, the obligation to remain faithful to its Treaties has its limits; and it may not be asked to sacrifice, in the execution of Treaties, that which compromises its original right of potentiality, or the necessary development of its resources; nor to perform acts which are incompatible with present affairs; and it may consider such Treaties null. "The State that desires to consolidate its existence, and to assure its development, must be able to free itself from the bonds (*liens*) which bind it to other States, and from a future where its administration would be inspired by entirely different principles. To deny this truth would sacrifice substance to shadow, and incite loyalty to the State to commit suicide." "The Convention-right must efface itself before those rights that are original and inalienable."²¹ "Fiore says that "Treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights." Vattel concurs that "a Treaty pernicious to the State is null, and not at all obligatory. The nation itself being necessarily obliged to perform everything required for its preservation and safety, cannot enter into

²⁰Hautefeuille's *Des Droits et Des Devoirs des Nations Neutres*, (3me ed.), vol. 1, p. xiii. "Hautefeuille is the author of the ablest Treatises on the Science of International Law that have appeared in France:" Wheaton on International Law, by Lawrence, p. 21n.

²¹Bluntschli's *Droit International Codifié*, (5me ed.), pp. 244, 263, et al.

engagements contrary to its indispensable obligations." And he cites, as an illustration, that "in the year 1506 the States-General of the Kingdom of France engaged Louis XII. to break the Treaty he had concluded with the Emperor Maximilian and the Arch-duke Philip, his son, because that Treaty was pernicious to the kingdom. They also decided that neither the Treaty, nor the oath that had accompanied it, could be binding on the King, who had no right to alienate the property of the Crown."¹⁰

But, while these authorities are not entirely concurred with by some English writers, one writer, however, who does not concur, admits that internationally, as no superior coercive power exists, and as enforcement is not always convenient, or practical, to the injured party, the individual State must be allowed in all cases to enforce, or annul, for itself as it may choose.¹¹

It was well said by Chief Justice Jay, of the Supreme Court of the United States, that "the contracts of sovereigns are made for the benefit of all their own subjects; and therefore every sovereign is interested in every act which necessarily limits, impairs or destroys that benefit. Whatever injuries result to the subjects run back from them to their sovereign." And he further said that a voluntary validity of a Treaty is that validity by which a Treaty that has become voidable by reason of violations, afterwards continues to retain validity by the silent volition and acquiescence of the nations concerned;¹² or, in other words, "during pleasure."

Great Britain has also furnished a precedent on the prerogative right of a sovereignty to vary Treaties dealing with the subordinate class of municipal privileges discussed in this article, by imposing, in the Imperial Extradition Act of 1870, certain restrictive conditions on the treaty right of foreign nations to claim the surrender of fugitive criminals not specified in the previous extradition treaties with France, United States, and Denmark. One of these restrictive conditions was that: "a fugitive criminal shall not be surrendered to a foreign State, unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not be detained, or tried, in that foreign State for any offence committed prior to his surrender, other than the ex-

¹⁰Vattel's Law of Nations, p. 104.

¹¹Hall's International Law, (5th ed.), 352 and 353.

¹²Jones v. Walker, 2 Paine, (U.S.), 688.

tradition crime proved by the facts on which the surrender is grounded."³³

In 1876, the British Government refused to surrender to the United States one Winslow, charged with forgery, "unless a promise was made by law, or arrangement, that he should be tried only for the extradition crime." This was declined by the United States; and the President thereupon intimated to Congress, and to the British Government, that he would not either make, or grant, requisitions, for the surrender of fugitive criminals, under the Extradition Treaty of 1842. Subsequently the British Government, while the statutory restriction was in force, consented that fugitive criminals would be surrendered to the United States "without asking for any engagement as to such persons not being tried in the United States for other than offences for which extradition had been demanded."³⁴

A different policy was affirmed by Germany when the Imperial Court decided that whenever a Treaty with the United States conflicted with German municipal law, the Court would be compelled to enforce the latter.³⁵

It would seem, therefore, to be reasonable in the international and diplomatic interests of other nation-sovereignities that the doctrine which these precedents sanction, and which the United States has heretofore enforced, and thereby incorporated into its administration of International Law, should be recognized as formulating an authoritative doctrine of general International Law, governing the class of Treaties which concede to the alien-subjects of a privileged nation, commercial and residential privileges, or territorial easements, or privileges of sharing in the natural rights and public property of the home-subjects of the conceding nation.

The War of 1812 had abrogated the previous fishing privileges conceded to American fishermen by the Treaty of Independence of 1783; and during the negotiations for the Treaty of Ghent of 1814, the British Plenipotentiaries informed the American Commissioners that "the privileges formerly granted to the United States of fishing within the limits of British coast-waters, and of landing and drying

³³ 33 and 34 Victoria (Imp.) c. 52.

³⁴ Foreign Relations, (U.S.), 1876, pp. 204-308, 387-8, p. 270.

³⁵ Braeg's case, Moore's Digest of the International Law of the United States, v. 5, p. 308.

fish on British-Colonial coasts, would not be renewed gratuitously, or without an equivalent."²⁶ But in 1818, the British Government gratuitously reversed this policy by intimating to the American Secretary of State that "in estimating the value of these proposals" (of fishery privileges in the coast-waters of Canada and Newfoundland), "the American Government will not fail to recollect that they are offered without any equivalent," of either a financial consideration, or of a reciprocal privilege of fish, within United States coast-waters.²⁷ a proposal which it must be needed classes this gratuitous concession of a colonial nation's right in their public property within Hautefeuille's class of "unequal Treaties," which he says "are not binding;" and which Bluntschli and Fiore class as "null."

Of the many Treaties between Great Britain and foreign nations, few appear to have caused so much international friction and diplomatic controversy as the one which conceded this gratuitous concession of the trade-class privileges set out in the Fishery Article of the Anglo-American Treaty of 1818, by which Great Britain generously conceded to "the inhabitants of the United States," of the trade of "American fishermen," to have "forever, in common with the subjects of His Britannic Majesty," (1) the *liberty* to take fish of every kind in the following specially designated coast-waters: (a) "the southern coast of Newfoundland, from Cape Ray to the Rameau Islands;" (b) "the western and northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Island;" (c) "the shores of the Magdalen Islands;" and (d) "the coasts, bays, harbours, and creeks," from Mount St. John, and thence northwardly, indefinitely, along the said Labrador coast of Newfoundland; with (2) the *liberty* to dry and cure fish "in any of the unsettled bays, harbours and creeks" on the southern coast of Newfoundland from the Rameau Islands to Cape Ray; but such *liberty* is not to be lawful where any portion thereof shall become settled, without previous agreement with the proprietors of the ground; and (3) the further *liberty* to enter all British Colonial bays, or harbours, "for shelter, or repairing damages, or procuring wood and water."²⁸ And the Treaty then de-

²⁶ American State Papers, Foreign Relations, vol. 3, pp. 705 and 708.

²⁷ Ibid. vol. 4, p. 365.

²⁸ Treaties and Conventions between the United States and other Powers, p. 350.

NEWFOUNDLAND
THE LINES ALONG THE COASTS
INDICATE THE EXTENT OF
THE FISHERY CONCESSIONS
TO THE UNITED STATES



declares that these gratuitous fishery privileges to American fishermen shall be subject to "such Restrictions as may be necessary to prevent their taking, drying, or curing fish (in certain bays or harbours), or in any other manner whatever abusing the *privileges* hereby reserved to them."³⁰

As stated by Hautefeuille, the stipulation "for ever" in this secondary, or alien-subject class of Treaties, is to avoid the necessity of renewals, and is not therefore, indefinitely, or in perpetuity, binding on the conceding nation.

The classifications of the designated water-localities where American fishermen were to exercise the Treaty concession of fishery privileges in Newfoundland, Magdalen Islands, and Labrador, were finally settled after many diplomatic negotiations containing offers, and counter-demands, between the two governments extending over three years, 1815-1818.³¹ The limitation of the Newfoundland concession of fishery privileges to the "coasts;" and the extension of the Labrador concession of fishery privileges to the "coasts, bays, harbours, and creeks" of that territory, clearly indicate an intention to discriminate in favor of Newfoundland. For in International law, the term "coast" has long been held to mean the elevated land which rises out of the sea along the coast-line, and its continuation along an imaginary straight line from headland to headland over the submerged land at the mouths of bays, inlets, rivers, and other arms of the sea, indenting the coast-line, of the mouth-width not exceeding two marine leagues (six sea miles). According to Hautefeuille, the seaward side of this imaginary straight line (*la ligne fictive*) "is the place of the departure of the cannon shot;" and which, as expressed in a statute affirmed by the Supreme Court of the United States, is "equivalent to the [elevated land] shore line;" and along which the three mile belt of territorial coast-waters extends. In the same case, the Court said "the control of fisheries to the extent of at

³⁰ This plural term "privileges," is equivalent to the term "liberties;" and may be held to include within it each of the several fishery concessions, designated by the singular term "liberty," in the Article; and, therefore, that the authorized "restrictions" are such as may be necessary to prevent the abuse of each "liberty" described in the Article.

³¹ American State Papers, Foreign Relations, v. 4, pp. 348-407.

least a marine league from the shore, belongs to the nation on whose coast the fisheries are prosecuted."⁴¹

And as a corollary to this, the doctrine of civil, as well as international law is applicable, that public grants convey nothing by implication, and are to be construed strictly in favor of the Crown; for a King's grant shall never be construed, or be deemed to be, to his prejudice, or to the prejudice of the commonwealth. And in applying this doctrine to a Spanish Treaty, the Supreme Court of the United States said: "The King of Spain was the grantor, the Treaty was his deed, the exception was made by him, and its nature and effect depended on his intention expressed by his words in reference to the thing granted, and the thing reserved, in and by the grant;" and it held that the Spanish words in the Treaty governed.⁴²

The Treaty acknowledgment of the legislative sovereignty of Great Britain to prescribe such Restrictions as may be necessary to prevent the abuse of the Treaty privileges by American fishermen, in no way displaced or limited the inherent prerogative right of British legislative authority to vary or revoke, any one, or all, of the "liberties" reserved by the Treaty; nor, under both rights, to pass laws restricting the right of contract, the use of fishery trade implements, the purchase of bait from licensed persons, the observance of a close season for fishing, and other municipal laws for the peace, order and good government of the fishery; also laws prescribing practical modes of preserving, and increasing, the productiveness of the fish-wealth of the Treaty coast-waters, such as limiting a season's catch by the tonnage of the American fishing vessels engaged; or such other prerogative laws as may vary, or revoke, the gratuitous privileges of fishing within such coast-waters by American fishermen, and as may be warranted by the precedents affecting treaties of the same class between the United States and France, Russia, Canada, and China, as above cited.

But in any event, this "liberty to take fish," in common with British subjects, cannot be construed to permit the assertion of any jarring claim on the part of American fishermen of an immunity from British and Colonial laws regu-

⁴¹ *Hautefeuille*, v. 1, p. 59; *Manchester v. Massachusetts*, (1890) 149 U. S. 240; *Whenton on International Law* (4th ed.), p. 277; *Halleck on International Law* (4th ed.), v. 1, p. 174.

⁴² *United States v. Arredondo* (1832), 6 Peters (U.S.), pp. 738-741; *The Rebeckah*, (1799), 1 C. Rob. 230.

lating fishing within the Treaty coast-waters, or of any claim of right, or privilege, which could in any way limit, or prejudice, the earlier, or pre-treaty natural right, or privilege, of the colonial subjects of the Crown to fish in their own coast-waters.

The territorial coast-mileage of these gratuitous fishery privileges conceded to American fishermen extends along about 870 miles of the Canadian coast-waters, and about 1,790 miles of the Newfoundland coast-waters, or about 2,660 miles of the teeming fish-wealth of these British-American waters.

Furthermore, this concession has long been an "entangling alliance," which has been productive of much International friction with the United States, chiefly caused by the assertion by its Government of untenable claims of the immunity of American fishermen from the British and Colonial fishery and customs laws, which are binding on the Colonial subjects of the Crown; and also caused by some grave instances of the misuse by American fishermen, of the fishery privileges within the Colonial coast-waters.

The earlier misuse of these fishery privileges by American fishermen was thus summarized by Lord Bathurst in 1816: "It was not of fair competition that His Majesty's Government have reason to complain, but of the pre-occupation of British harbours by the fishery vessels of the United States, and the forcible expulsion of British vessels from places where their fisheries might be advantageously conducted."⁴³ And later by Lord Salisbury forwarding to the United States Government the report of the Naval officer at Newfoundland in 1878: "The report appears to demonstrate conclusively that the United States fishermen committed three distinct breaches of the law; and that in the case of a vessel whose master refused to comply with the request that he should desist from fishing on Sunday, in violation of the law of the colony, and of the local custom, and who threatened the Newfoundland fishermen with a revolver." The breaches of the law were: (1) fishing with purse-seines; (2) fishing during the close season; and (3) fishing on Sunday. The naval officer further reported that the American fishermen were fishing illegally and interfering with the rights of British fishermen, and their peaceful use of the coast occupied by them, and of their boats and their

⁴³ American State Papers, Foreign Relations, vol. 4, p. 356.

huts, gardens, and lands granted them by their Government.⁴⁴

The reply of the United States to this was the assertion by Mr. Secretary Evarts of the immunity of American fishermen from the local fishery laws, and the claim of a joint authority of Great Britain and the United States, over the coast-waters of Canada and Newfoundland, described in the Treaty: "This Government conceives that the fishery rights of the United States are to be exercised wholly free from the restraints and regulations of the Statutes of Newfoundland." "If there are to be regulations of a common enjoyment, they must be authenticated by a common or joint authority."⁴⁵ Lord Salisbury replied: "I hardly believe that Mr. Evarts would, in discussion, adhere to the broad doctrine, which some portion of his language would appear to convey, that no British authority has a right to pass any kind of laws binding on Americans who are fishing in British waters: for if that contention be just, the Treaty waters must be delivered over to anarchy."⁴⁶ Or the injured authority may invoke the rule of International Law, which says that whenever one of the contracting parties has not performed its obligations, or violates the Treaty, the wronged party has the right to consider itself as freed.⁴⁷

The same immunity from British laws has been more recently asserted by Mr. Secretary Root in 1906: "Great Britain has asserted a claim of right to regulate the action of American fishermen in the Treaty waters, upon the ground that these waters are within the territorial jurisdiction of the Colony of Newfoundland. This Government is constrained to repeat emphatically its dissent from any such view. An appeal to the general jurisdiction of Great Britain over the territory is, therefore, a complete begging of the question, which always must be, not whether the jurisdiction of the colony authorizes a law limiting the exercise of the Treaty right, but whether the terms of the grant authorize it."⁴⁸

In making this broad statement, the Secretary of State appears to be unacquainted with the doctrines of British law

⁴⁴ Foreign Relations, (U.S.), 1878-9, p. 285.

⁴⁵ Ibid., p. 310.

⁴⁶ Ibid., p. 323.

⁴⁷ Bluntschli's *Droit International Codifié*, v. 1, p. 261.

⁴⁸ Correspondence respecting the Newfoundland Fisheries, (Imp.), 1906, p. 13.

which govern all parts of the Empire. It is a doctrine of that law,—affirmed many years ago by the Judicial Committee of the Privy Council, and in later years by the Imperial Parliament,—that, under the British system of Constitutional Government, a Treaty between Great Britain and a Foreign Power which provides for the cession, or exclusion, of British territory from the British Sovereignty, jurisdiction and laws, theretofore established therein; or for the treaty grant of any municipal or extraordinary easements, or transit of foreign goods or other trade or freehold privileges to alien-subjects, within any British territory, can only become legally operative therein, in the time of peace, after being specially confirmed by an Act of the Imperial or Colonial Parliament having legislative authority in the matter.⁴⁹

In asserting this repudiation of the binding force of British and Colonial Laws on American fishermen exercising the privilege of fishing within British jurisdiction, Mr. Secretary Root also negatives the prior diplomatic admissions of the Government of the United States made by Mr. Secretary Marcy in 1856, who, after intimating to American fishermen that there were Acts of the British Colonial legislatures intended to promote the productiveness of the fisheries, said: "the observance of them is enforced upon the citizens of the United States in the like manner as they are observed by British subjects."⁵⁰ Mr. Secretary Boutwell, in 1870, took the same view and directed his officers that the "fishermen of the United States are bound to respect the British laws for the regulation and preservation of the fisheries, to the same extent to which they are applicable to British and Canadian fishermen."⁵¹ And Mr. Secretary Bayard, in 1886, assured the British Government that "everything will be done by the United States to cause their citizens engaged in fishing to conform to the obligations of the Treaty, and to prevent an infraction of the Fishery laws of the British Provinces."⁵²

⁴⁹ *Damhodar Gordhan v. Deoram Kanji*, (1875), 1 Appeal Cases, 332; the Anglo-German Agreement Act, (Heligoland), 1890, (Imp.), c. 32; and the Anglo-French Convention Act (Africa and Newfoundland), 1904, (Imp.), c. 33; *Attorney-General of Canada v. Cain*, (1906), Appeal Cases, 542.

⁵⁰ Foreign Relations, (U.S.), 1880-1, p. 572.

⁵¹ Circular, 9th June, 1870.

⁵² Foreign Relations (U.S.), 1886, p. 377; U.S. Senate, Ex. Doc. 1887-8, v. 9, p. 467.

These diplomatic admissions agree with the legal opinion of the British Law Officers to the Colonial Secretary in 1863: "In our opinion the inhabitants of the United States fishing within waters in the territorial jurisdiction of the legislature of Newfoundland, or of any other of the British Colonies, are bound to obey, and are legally punishable for disregarding, the laws and regulations for the conduct of the fisheries enacted by or under the authority of the respective Provincial Legislatures."⁵³

Against the recent diplomatic contentions of the United States may be cited the higher authority of Hautefeuille on International Law: "The words 'nation,' 'peoples,' indicate human societies living in a state of liberty, of independence, mutual and absolute. Without this independence, nationality does not exist. The society that recognizes a stranger chief (*un chef étranger*), in common with another society, is not in itself a nation, but an assembly with subjects of another nation. Free peoples, sovereign peoples, have therefore no arbitrator, or common judge, (*n'ont donc aucun arbitre aucun juge commun*), who can decree on the differences, estimate the pretensions, pronounce a sentence, and have it executed between them and all other parties interested."⁵⁴

The disturbing misuse of the Treaty privileges of fishing, and the frequent repudiation of British and Colonial Laws, violate a doctrine of International Law long recognized and enforced by the United States: "Aliens while within our jurisdiction, and enjoying the protection of our laws, are bound to obedience to them, and to avoid disturbances of our peace within, or acts which would compromise it without, equally as citizens are."⁵⁵

And the British doctrine concurs: "Every individual on entering a foreign country, binds himself by a tacit contract to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm."⁵⁶

And now that the questions affecting these gratuitous fishery privileges to American fishermen are about to be submitted to the Hague Tribunal, it is hoped by the Colonial

⁵³ Opinion of Sir W. Atherton, and Sir Roundell Palmer, 6th January, 1863, in *The Fisheries Question*, U.S. Senate, Ex. Doc. 1887-8, v. 9, No. 113, p. 251.

⁵⁴ Hautefeuille's *Des Droits et des Devoirs des Nations Neutres*, (3me ed.), v. 1, p. 7; *Schooner Exchange*, 7 Cranch, (U.S.), 116.

⁵⁵ Moore's *Digest of International Law of the United States*, vol. 4, p. 10.

⁵⁶ Phillimore's *International Law*, (3rd ed.), vol. 1, p. 454.

subjects of the Crown who are to be affected by its decision, that Great Britain will raise for discussion or adjudication, the claim of an inherent prerogative revocation-power, similar to that exercised by the United States, as illustrated by the precedents cited in this article, so as to enable her to relieve her colonies from the coast-burthen, or any future violation, of these gratuitous fishery privileges; and from repetitions of the misuse and aggressive claims, which have caused so much International friction between herself and her colonies, and between them and the United States, in past years. For it should be seriously and nationally realized by Great Britain that the teeming fish-wealth of these Colonial coast-waters is the natural property of the Colonial subjects of the Crown, as part of their food supply, and also as being valuable to them as one of their commercial assets for Colonial trade and revenue purposes. •

And if this policy of concessions of our natural resources and property in the fish-wealth of our sea-coast waters to American fishermen, "without any equivalent," be politically just, then it may sanction the gratuitous concession of the fish-wealth of our fresh-water lakes and rivers to them, or other foreign fishermen. And, if so, then it could not be politically unjust if gratuitous concessions of other of the colonial natural resources and property, such as the timber-wealth of our forests, the mineral-wealth of our mines, and the electric force power of our water-ways, should be conceded to American or other foreign lumbermen, miners, electricians or traders, "without any equivalent," and "for ever," as in the Fishery Article of 1818. Such a policy of national prodigality and as unfaithful almoners of our food supplies and raw materials would soon deplete and squander the natural resources and property with which a giftful nature had endowed the colonies, and thereby commercially pauperize our people, for the benefit of the trade and financial enterprises of the alien-subjects of other nations. For as Vattel says: "A prince ought not, in affairs of this nature, to obey the suggestions of generosity impelling him to sacrifice the nation's natural resources and property to the advantage of others, because it is not his private property that is given away, but that of the nation-people who have committed themselves to his care."⁵⁷

And on the trade question, Vattel says: "The exceeding importance of trade, not only to the wants and conveni-

⁵⁷ Vattel's Law of Nations, p. 141.

ences of life, but likewise to the national strength of the State, and the furnishing it with the means of defending itself against its enemies, and the insatiable avidity of those nations who seek wholly and exclusively to control trade;—these circumstances authorize a nation possessed of a special branch of trade to reserve to itself this source of national wealth; and instead of communicating, or sharing, it with foreign nations, to take measures against it.”²²

The doctrines of *jus inter gentes* as to the inherent prerogatives and territorial inviolability of national sovereignty, which appear to indicate what should be the International decision of this question; the experience of the disturbing misuse; of the international friction, and of breaches of local fisheries laws; the repudiation of the authority of British and Colonial laws as governing American fishermen, thereby “delivering the Treaty waters over to anarchy;” the natural rights of her Colonial subjects in their public property, and the consequent urgent necessity for their relief from “the entangling alliance” of the gratuitously conceded fishery privileges in their Colonial coast-waters—aided by the supporting force of the American precedents given above—should guide Great Britain in presenting their case before the Hague Tribunal, and in seeking to have those precedents authoritatively recognized as formulating a universal doctrine of International Law applicable to the subordinate or secondary class of Treaties which concede to the alien-subjects of another sovereignty a share in the national rights in the public property and commercial trade-assets of the home-subjects of the conceding sovereignty.

THOMAS HODGINS.

Since this article was written, the Imperial Government of Japan, has announced that they are about to add some precedents to those quoted in the article on the inherent prerogative right of a nation to revoke treaty concessions of commercial and trade privileges to the alien-subjects of other nations. The following cable despatch gives the announcement of this new diplomatic policy of Japan:

Tokio, Feb. 2.—Count Komura, the Foreign Minister, announced to-day in Parliament that: “The foreign policy of this empire should have as an object the maintenance of peace and the development of natural resources, and that the Imperial Government had decided to notify the various powers next year of the termination of existing commercial treaties, to be effective one year after such notice was given. He said that it was the intention of the Government to negotiate new treaties unhampered by any unequal engagements.”

²² Vattel's Law of Nations, p. 140.